United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

75-7406

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UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 75-7406

EUGENE LEWIS, GLADYS CROOM, etc.

Plaintiffs-Appellees,

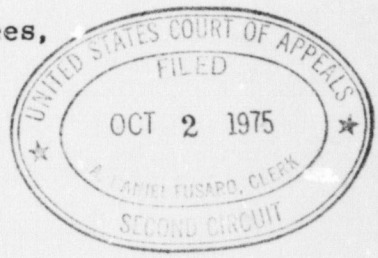
v.

JOSEPH A. WALSH, etc., et al

Defendants,

PETER FREER and FRANCIS MATTHEWS,

Defendants-Appellants



APPEAL FROM VERDICT AND JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT

BRIEF OF DEFENDANTS-APPELLANTS

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STATUTES INVOLVED

42 U. S. C. Section 1983. Civil Action for Deprivation of Rights.

Every person, who under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Connecticut General Statutes, Section 53-65. Receiving Stolen Goods.

Any person who receives and conceals any stolen goods or articles, knowing them to be stolen, shall be prosecuted and punished as a principal, although the person who committed the theft is not convicted thereof. (1949 Rev. § 8403.)

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ISSUES

1. Is the verdict on the false arrest claim contrary to the weight of evidence, the law and the verdict on the unreasonable entry claim?

2. Did the court abuse its discretion in allowing the jury to change its verdict as to the defendant's good faith defense?

3. Was it error to admit evidence as to the handling and disposition of plaintiff's arrest by the criminal court?

JURISDICTION AND HISTORY

This is Title 42 § 1983 Civil Rights action brought by John Croom and Jeffrey Croom against defendant police officers Peter Freer and Francis Matthews, the complaint against Joseph A. Walsh and others being withdrawn prior to trial.

The named plaintiff, Eugene Lewis, has no connection with this case. His action and another were the result of entirely unrelated incidents involving different police officers. The cases were separated for trial. Gladys Croom was named as a plaintiff-guardian for her son, Jeffrey Croom, who was a minor at the time the action was instituted.

Both plaintiffs and defendants motion for directed verdict were denied. The jury returned a special verdict against Jeffrey Croom on his excessive force claim and against John Croom on his unreasonable entry claim. The jury found that the defendants prevailed on their reasonable good faith defense, but inconsistently awarded $10,650.00 on John Croom's false arrest claim only. Connecticut District Judge, Jon Newman, ordered the jury to resolve the inconsistency over the objection from the defendant who moved for judgment. The jury changed its answers to the interrogatories to find against the defendants on their reasonable good faith defense.

Despite motions for judgment N.O.V. and a new trial, judgment was entered for John Croom for $10,650.00 against defendants, Peter Freer and Francis Matthews.

STATEMENT OF THE CASE

I. THE ENTRY AND ARREST

The following facts, although in part controverted, were accepted by the jury in denying John Croom's unreasonable entry claim and represent the overwhelming weight of the testimony and evidence.

On September 21, 1971, at about 12:30 A. M. an anonymous caller informed the Bridgeport Police Complaint Bureau that a safe and a market basket containing typewriters were being pushed across Park Avenue in the vicinity of Marina Village Apartments. *

Pastor, A34, 35;
Freer, A17, 18, 19;
Matthews, A24;
Leake, A44;
Bartomeli, A53.

This information was transmitted by radio to the defendants. Further information was relayed to the defendants by phone that one of the parties was plaintiff, Jeffrey Croom, a known burglar, Exhibit O and P,[1] and that items had been transported into the Croom home by Jeffrey Croom, Kevin Blackwell and a girl in a red dress.

Pastor, A35;
Freer, A17;
Matthews, A24.

Plaintiff, Jeffrey Croom, invoked his Fifth Amendment privilege and refused to testify about his actions during this period prior to his arrest.

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* Reference hereafter preceded by "A" refers to the Joint Appendix.

1. A, 62, 63.

Croom, A14.

Defendants, Matthews, Freer and witness, Sgt. Pastor, peered into the Croom apartment. There was no dispute that the pantry area could be seen from outside the premises through the rear door.

Candace Shields, A13;
John Croom, A2, 3;
Jeffrey Croom, A15.

The jury's finding that the entry into John Croom's apartment was reasonable implies acceptance of the overwhelming weight of evidence that two electric typewriters, a black case and several cartons of coca-cola were observed in the pantry area.

Pastor, A36;
Freer, A20 through A23;
Matthews, A29;
Exhibit I. J., Record.

Entry was duly made and John Croom was found seated in the kitchen adjacent to the door and the pantry area. The pantry area was visible from the kitchen.

Croom, A1;
Shields, A9.

The elapsed time between the first call and the entry into the plaintiff's apartment was three to five minutes.

Matthews, A32;
Pastor, A43.

John Croom's son-in-law, Roosevelt Shields, placed John in the kitchen when he arrived home twenty-minutes before the police entered the apartment.

Shields, A8, 9.

From a name plate inside the black tool box recovered from the plaintiff's apartment the owner of the Sprague Electric Co., with offices 150 to 200 yards from the plaintiff's residence, was contacted and identified the electric typewriters, saw and radio taken from Croom's apartment as his.

Pjura, A50, 52.

Also missing from the company were six cases of coca-cola and a shopping cart.

Pjura, A50.

The missing safe was subsequently found in the Croom's rear yard.

Leake, A47;
Pjura, A51.

According to Sgt. Pastor, the defendants and other defendants' witnesses, John Croom admitted to being home when Jeffrey brought in the stolen items.

Pastor, A37, 38, 39, 40;
Matthews, A30, 31.

John Croom and other members of the family denied that there were ever any stolen items in his apartment.

John Croom, A6, 7, 54, 55;
Shields, A10, 11, 12.

Roosevelt Shields did admit that the police . moved one typewriter from the premises.

Roosevelt Shields, A10 through 12.

In view of the evidence and testimony of the owner of the stolen items these denials were obviously ineffective and were not accepted by the jury in finding that the entry by the defendants was reasonable.

There was no evidence that the defendants acted out of malice or other improper motive in arresting John Croom.

II. THE VERDICT

The jury returned the interrogatories with affirmative answers to interrogatories 6 and 8, yet found $10,650.00 in answer to interrogatory 11 B. (A57) The court pointed out the inconsistency and, over objection of defendants' counsel, who moved for judgment on the basis of the answers to interrogatories 6 and 8, ordered the jury to reconsider its findings. The transcript of these proceedings omits this colloquy and if obtained, a supplemental transcript will be filed.

Upon reconsideration, the jury changed its good faith finding to conform to its $10,650.00 verdict even though they found the police had made a lawful entry to recover the stolen goods.

A56, 57.

III. DISPOSITION OF CRIMINAL CHARGES

Evidence that the criminal charges against John and Jeffrey Croom were nolled by the prosecutor was admitted over objection of the defendant.

A 4, 5.

ARGUMENT

1. FALSE ARREST

The issue, of course, is not whether John Croom was guilty of the offense charged but whether defendant officers, under the circumstances, had probable cause for believing that he had committed the offense, or lacking this, reasonably believed in good faith that they had such probable cause.

> Bivens v. Six Unknown Agents, 456 F 2d 1339 (1972) 2nd Cir.

Nevertheless, the law defining receipt of stolen goods is usually expressed in terms of the greater quantum of proof necessary for conviction and, therefore, reference must be made chiefly to this type of holding.

The circumstances here, either admitted or proved, are that John Croom was in possession of the premises, his seventeen year old son was a known burglar and in the middle of the night, brought recently stolen tools and appliances not normally purchased at such time into John Croom's apartment leaving them in John Croom's presence.

> " Some cases declare that it is sufficient that the defendant had reason to believe that the goods had been stolen. That is, the existence of guilty knowledge is to be regarded as established when the circumstances surrounding the receipt of the property were such as would charge a reasonable man with notice or knowledge or would put a reasonable man upon inquiry which if pursued would disclose that conclusion. This is the objective test rule, under which it is the reaction of a reasonable man to the circumstances which is the criterion."
>
> Wharton's Criminal Law and Procedure, Vol. 2, P. 281.

Connecticut is among those jurisdictions applying this objective test.

> ". . . No one has appeared who testifies that he said to Weiner, or who gave him any positive and direct information, that it was stolen property. But if from all the circumstances which surrounded Weiner at the time, from what he saw and heard, he as a reasonable man should have come to the conclusion that it was stolen property, then you may infer his knowledge from such circumstances and facts. You have only to ask yourselves what knowledge would a reasonable man of honest intentions infer or gather from the facts and circumstances that were around him and that he saw and heard about him."

State v. Weiner, 84 Conn. 411, 80 A 198

The presumption is based upon common experience and inherent probability and is not exhausted until substantial countervailing evidence is produced.

State v. Donnelly, 124 Conn. 661, 663 (1938) 2 A 2d 214.

Nor must possession of the stolen goods lie in the defendant's exclusive possession.

State v. Raymond, 46 Conn. 345.

Possession of fruits of a crime, recently after its commission, justifies the inference that the possession is guilty possession and is prima facie evidence of guilt.

Wilson v. U.S., 162 U.S. 613, 619 (1895);
Rugendorf v. U.S., 376 U.S. 528, 84 S.Ct. 825, 11 L Ed. 2d 887 (1964)

Here freshly stolen goods were carried into the defendant's apartment, found near him, and he not only offered no explanation of their presence, but on

the stand, undaunted by the testimony of the goods owner, and the photographic evidence, denied that they were found in his apartment!

There have been an untold number of decisions upholding convictions beyond a reasonable doubt where the possession was only constructive.

> Seller v. U. S., 299 F 251-Cigarettes in a barn behind defendants' house.;
> Rugendorf v. U. S. supra.
> Furs in cellar closet, defendant was absent from home on extended vacation, four keys to the house were in the hands of outsiders, one of them a known receiver of stolen goods.

In the trial and arguments, plaintiffs' counsel stressed the short lapse of time between the report of the crime and the arrest of John Croom. The logic of the argument was never clear, and to the contrary, as noted by Wigmore: ". . .the lapse of a long interval opens a greater possibility of innocent explanations."

Wigmore, Evidence 3rd Edition § 152.

There was a complete lack of evidence that the defendants had any malice towards the plaintiff or acted out of any other improper motive. In view of the circumstances, as known to the defendants, the court should have held as a matter of law that they had reasonable belief, in good faith, of probable cause to arrest John Croom as a receiver of the stolen goods.

The jury's original answers to interrogatories 6 and 8 are the only ones possible in light of the circumstances, the law, and the total lack of evidence of malice on the defendants part.

That police officers lawfully entering premises to recover stolen goods should be subjected to a $10,650.00 judgment for arresting the lessee of the premises is a result as unjust as it is contrary to common sense.

In short, the issue is this. Can two policemen lawfully entering premises and recovering stolen goods therein, be held liable for arresting the lessee of the premises, found on the scene, near the contraband, with no explanation?

2. THE CHANGED ANSWERS TO INTERROGATORIES 6 and 8.

The court considered the special verdict to be entered under Rule 49 (b). This rule empowers the court to enter judgment in accordance with the interrogatories notwithstanding the general verdict. The court chose, over defendants' objection and motion for judgment not to follow this course but to resubmit the verdict to the jury to resolve the inconsistencies. In the circumstances of this case, and in light of the evidence, this was an abuse of discretion. The original answers to interrogatories 6 and 8 were the only ones supportable by the evidence and consistent with the factual assumption underlying answers to interrogatories 1 and 3, for reasons summarized in the statement of the case.

The court considered the case to be governed by Rule 49 (b) on the theory that question 11 was in the nature of a general verdict. Newman, Memorandum of Decision.[1] It is submitted that a better interpretation is that interrogatories 11A, 11B, 12A and 12B are not general verdicts but are similar to question 17 in the

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1. A 58-60.

case of Griffin v. Matherne, 471 F 2d 911, 914 (1973).

In the Griffin case, the distinction between Rule 49 (a) and Rule 49 (b) F. R. C. P., was an issue addressed by the court directly and its holding is not in the nature of dicta as in the 2nd Circuit case referred to by Judge Newman in his Memorandum of Decision.

Ressler v. States Marine Lines, Inc.
_____F2_____(2nd Cir. May 5, 1971) (slip op. 3441)

The case relied upon by Judge Newman as authority for an implicit resubmission authority under rule 49 (a) does not appear to be either a 49 (a) or 49 (b) case.

University Computing Co. v. Lykes-Youngstown Corp., 504 F 2d 518 (5th Cir. 1974)

As noted by the 5th Circuit, there has been some confusion, even among authorities as to the distinction between Rule 49 (a) and Rule 49 (b), but the lack of a resubmission authority in 49 (a) does not appear to be the result of an oversight.

Griffin v. Matherne, supra foot note 6, p. 917.

The court should have entered judgment for the defendants based upon the interrogatories as originally answered.

3. THE CRIMINAL NOLLE

The court allowed both plaintiffs to testify that the charges against them were nolled in the criminal court. The actions of the defendant officers are the only issue to be weighed by the jury. What the defendants told the prosecutor is relevant, but certainly the actions of the prosecutor are not, for he is not the

defendants' agent nor otherwise under their control. The nolle of the criminal charges is an act of the prosecutor and is relevant to no material issue. Evidence which is not relevant is not admissable.

Federal Rules of Evidence, Rule 402.

This rule is a restatement of Thayers classic theory of jurisprudence that "nothing is to be received which is not logically probative of some matter requiring to be proved."

Weinstein Evidence, Vol. 1 § 402 (01)

The quantum of proof necessary to successfully prosecute a criminal case (beyond reasonable doubt) is not in the least similar to a lack of probable cause.

U. S. v. Casale Car Leasing, Inc. 385 F 2d 707, 712 (1967);
Bivens v. Six Unknown Agents, 456 F 2d 1339 (2nd Cir. 1972)

Even though the court instructed the jury that it should give no substantive weight to the fact of the nolles, this irrelevant fact could only prejudice the position of the defendants on the ultimate issue of the case.

McKenna v. Whipple, 97 Conn. 695, 701 (1922).

"It was error. . . to admit into evidence the municipal court file which showed plaintiff had been acquitted."

Beckner v. Sears Roebuck, 4 C. A. 3d 504, 510; 84 Cal. Rp. Tr. 315, (1970)
Also Wiggs v. Farmer, 205 VA. 149, 135 S E 2d. 829, 832.

Cases headnoted in West under Judgment § 648.

Even relevant evidence must be excluded when its probative value is outweighed by the danger of unfair prejudice.

Rule 403 (a) Federal Rules of Evidence.

The actions of the prosecutor were material to no relevant issue in this case, and this evidence was extremely prejudicial to the defendants. Only one having personal knowledge of the deluge of cases handled by the prosecutors in municipal Connecticut Circuit Courts could understand the otherwise inexplicable nolling of these two cases.

CONCLUSION

The defendants request that this court order that judgment be entered for defendants either as judgment N. O. V. or judgment based upon the original answers to interrogatories 6 and 8 or in the alternative for a new trial on the issue of John Croom's false arrest claim.

RESPECTFULLY SUBMITTED,

DEFENDANTS-APPELLANTS

By _____
James M. Kearns
Their Attorney